



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R05-OAR-2016-0672; EPA-R05-OAR-2016-0706; EPA-R05-OAR-2016-0708; FRL-9649-01-R5]**

**Air Plan Approval; Indiana, Michigan and Minnesota; Revised  
Startup, Shutdown, and Malfunction Provisions**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve three State Implementation Plan (SIP) revision requests, submitted by Indiana, Michigan, and Minnesota. All three states submitted the SIP revision requests in 2016 in response to a finding of substantial inadequacy and a SIP call published on June 12, 2015, for specific provisions in each state's SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. Each of these SIP submissions was submitted independently and EPA is analyzing them individually. However, EPA is packaging the proposed approvals together in a single action both for administrative efficiency and because EPA's action approving the revisions consistently applies EPA's national policy regarding SSM provisions in SIPs. EPA is proposing approval of these SIP submissions and proposing to determine that each submission corrects the state's respective SIP deficiencies as identified in the June 12, 2015, SIP call.

**DATES:** Comments must be received on or before **[INSERT DATE 30**

**DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] .**

**ADDRESSES:** Submit your comments, identified by Docket ID No.

EPA-R05-OAR-2016-0672 (Indiana); EPA-R05-OAR-2016-0706

(Michigan); or EPA-R05-OAR-2016-0708 (Minnesota) at

<https://www.regulations.gov>, or via email to

[blakley.pamela@epa.gov](mailto:blakley.pamela@epa.gov). For comments submitted at

Regulations.gov, follow the online instructions for submitting

comments. Once submitted, comments cannot be edited or removed

from Regulations.gov. For either manner of submission, EPA may

publish any comment received to its public docket. Do not

submit electronically any information you consider to be

Confidential Business Information (CBI) or other information

whose disclosure is restricted by statute. Multimedia

submissions (audio, video, etc.) must be accompanied by a

written comment. The written comment is considered the official

comment and should include discussion of all points you wish to

make. EPA will generally not consider comments or comment

contents located outside of the primary submission (i.e. on the

web, cloud, or other file sharing system). For additional

submission methods, please contact the person identified in the

**FOR FURTHER INFORMATION CONTACT** section. For the full EPA

public comment policy, information about CBI or multimedia

submissions, and general guidance on making effective comments,

please visit [https://www2.epa.gov/dockets/commenting-epa-](https://www2.epa.gov/dockets/commenting-epa-dockets)

[dockets](https://www2.epa.gov/dockets/commenting-epa-dockets).

**FOR FURTHER INFORMATION CONTACT:** Mary Portanova, Environmental

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8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal  
holidays and facility closures due to COVID-19.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever  
"we," "us," or "our" is used, we mean EPA.

## **I. What is the background for EPA's proposed action?**

On February 22, 2013 (78 FR 12460), EPA published a *Federal Register* notice of proposed rulemaking outlining the agency's policy at the time with respect to SIP provisions related to periods of SSM. This policy stated that director's discretion and automatic exemption provisions for periods of SSM were impermissible under the Clean Air Act (CAA), but that appropriately drawn affirmative defense provisions may be permissible under certain circumstances. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.<sup>1</sup> For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a supplementary

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<sup>1</sup> State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (Feb. 22, 2013).

notice of proposed rulemaking that revised what the Agency had previously proposed on February 22, 2013, in light of a decision by the U.S. Court of Appeals for the District of Columbia Circuit that determined the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits.<sup>2</sup> EPA outlined in its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and to propose SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," (80 FR 33839, June 12, 2015), hereafter referred to as the "2015 SSM SIP Action." The 2015 SSM SIP Action clarified, restated, and updated EPA's interpretation that SSM exemptions and affirmative defense SIP provisions are inconsistent with CAA requirements.

The 2015 SSM SIP Action found that certain SIP provisions in 36 states, including Indiana, Michigan, and Minnesota, were substantially inadequate to meet CAA requirements and issued a

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<sup>2</sup> *NRDC v. EPA*, 749 F.3d 1055 (D.C.Cir.2014).

SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. The detailed rationale for issuing the SIP calls to Indiana, Michigan, and Minnesota can be found in the 2015 SSM SIP Action and preceding proposed actions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016. Indiana submitted a SIP revision request in response to the SIP call on November 14, 2016, and supplemented it on January 31, 2017. Michigan submitted a SIP revision request in response to the SIP call on November 15, 2016, and supplemented it on February 7, 2017. Minnesota submitted a SIP revision request in response to the SIP call on November 22, 2016, and supplemented it on February 10, 2017. This proposal addresses all three of these SIP submittals in a consolidated action.

In October 2020, EPA issued a Memorandum (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.<sup>3</sup> Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.” Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Indiana, Michigan, and Minnesota in 2015. The

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<sup>3</sup> October 9, 2020, memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

2020 Memorandum did, however, indicate EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).<sup>4</sup> As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.<sup>5</sup> The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including the three state SIP submittals provided in response to the 2015 SSM SIP Action which are addressed in this consolidated proposal.

## **II. EPA's analysis of the states' submissions.**

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<sup>4</sup> September 30, 2021, memorandum "Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy," from Janet McCabe, Deputy Administrator.

<sup>5</sup> 80 FR 33985, June 12, 2015.

## **Indiana**

In the 2015 SSM SIP Action, EPA determined that a provision in the Indiana SIP was substantially inadequate to meet CAA requirements. Indiana's SIP rules are codified in the Indiana Administrative Code (IAC). Indiana's rule 326 IAC 1-6-4(a) provided a director's discretion exemption from the otherwise applicable SIP emission limitations during malfunctions. EPA determined that the Indiana rule was inconsistent with the requirements of the CAA for the reasons explained in Section IX.F.2 of the 2015 SSM SIP Action.<sup>6</sup>

Indiana submitted its SIP revision request pursuant to the 2015 SSM SIP Action on November 14, 2016 and supplemented it on January 31, 2017. Indiana removed the provisions in 326 IAC 1-6-4(a) that provided for discretionary exemptions. The state removed language that read in part, *"Emissions temporarily exceeding the standards which are due to malfunctions of facilities or emission control equipment shall not be considered a violation of the rules provided that the source demonstrates..." [meeting a list of criteria]*. Indiana also removed language from 326 IAC 1-6-4(a)(1)-(4) which gave criteria that would have allowed for the exemptions. The rule at 326 IAC 1-6-4 now reads: *"Source owners or operators shall operate and maintain all emission control equipment and combustion process equipment or processes in compliance with all applicable rules."*

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<sup>6</sup> Although the 2015 SSM SIP Action describes Indiana's rule 1-6-4(a) "generally applicable," the actual rule applies only to non-major sources. It does not apply to larger facilities that have major source operating permits pursuant to title V of the CAA and 40 CFR part 70.

Indiana's submittal also included administrative revisions to other sections of rule 326 IAC 1-6, (1-6-1, 1-6-2, 1-6-5, and 1-6-6), such as replacing the word "shall" with "must" or changing "facility" to "emission unit" or "source". In addition, Indiana revised and submitted a separate general rule, 326 IAC 2-9-1, removing a reference to rule 326 IAC 1-6 applying during malfunctions. EPA is proposing to find that the revised language in 326 IAC 1-6 and 326 IAC 2-9-1 addresses the deficiency outlined in the 2015 SSM SIP Action for Indiana.

### ***Michigan***

In the 2015 SSM SIP Action, EPA determined that a provision in the Michigan SIP, Michigan Administrative Code R 336.1916, (R 336.1916), provided an affirmative defense to monetary penalties for violations of otherwise applicable SIP limitations during startup and shutdown periods and therefore was substantially inadequate to meet CAA SIP requirements. EPA's rationale for this determination is explained in Section IX.F.3 of the 2015 SSM SIP Action.

Michigan submitted its SIP revision request on November 15, 2016, and supplemented it on February 7, 2017.<sup>7</sup> Michigan revised and curtailed the applicability of R 336.1916, and requested that EPA remove it entirely from the Michigan SIP. Rule R 336.1916, as revised, specifically cites a list of Michigan's air toxics rules and its nuisance rule as the only rules to which the affirmative defense in R 336.1916 applies.

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<sup>7</sup> Michigan's 2017 submittal also requested SIP approval of eight other revised SIP rules, unrelated to the 2015 SSM SIP Action. EPA has addressed these rules in separate actions.



The air toxics and nuisance rules are not part of Michigan's criteria pollutant SIP. The revised rule R 336.1916 will remain on Michigan's books, but as a state-only rule. EPA is proposing to remove R 336.1916 from Michigan's federally enforceable criteria pollutant SIP, per Michigan's request, because the rule no longer applies to criteria pollutant emission limits. EPA is also proposing to find that the removal of R 336.1916 would remove the SSM deficiency from Michigan's SIP, and would fully address the 2015 SSM SIP Action.

### ***Minnesota***

In the 2015 SSM SIP Action, EPA determined that a provision in the Minnesota SIP was substantially inadequate to meet CAA requirements. The Minnesota rule, Minnesota Rule 7011.1415 (Minn. R. 7011.1415), provided automatic exemptions for excess emissions resulting from flared gas at petroleum refineries when the flaring is necessitated by SSM events. EPA determined that the Minnesota rule was inconsistent with the requirements of the CAA for the reasons more fully explained in Section IX.F.4 of the 2015 SSM SIP Action.

Minnesota submitted its SIP revision request on November 22, 2016, and supplemented it on February 10, 2017. Minnesota repealed Minn R. 7011.1415, effective December 27, 2016, and requested that EPA remove Minn. R. 7011.1415 from the SIP. EPA is proposing to approve Minnesota's SIP revision request because removing the deficient rule from the Minnesota SIP responds fully to the 2015 SSM SIP Action.

In summary, in the 2015 SSM SIP Action, EPA found that the SIPs for Indiana, Michigan, and Minnesota contained provisions that were substantially inadequate to meet CAA requirements, and accordingly issued a SIP call to the state to revise those SIP provisions. In response, Indiana, Michigan, and Minnesota have submitted SIP revision requests. In this action, EPA proposes to find that the SIP revisions submitted by each of the three states remedy the issues identified in EPA's 2015 SSM SIP Action, and therefore proposes to approve the SIP submittals from all three states and, if the proposed action is finalized, determine that the SIP call obligation issued in 2015 has been fulfilled. In the case of Indiana, EPA is proposing to approve the revised language in 326 IAC 1-6 and 326 IAC 2-9-1. In the cases of Michigan and Minnesota, EPA is proposing to remove Michigan's R 336.1916 and Minn. R. 7011.1415 from the Michigan and Minnesota SIPs, respectively. EPA is proposing to find that all three of these state SIP revision requests meet the requirements of the CAA and address the deficiencies in each SIP as outlined in EPA's 2015 SSM SIP Action.

### **III. What action is EPA proposing to take?**

EPA is proposing to approve three SIP revision requests submitted in 2016 and supplemented in 2017 by Indiana, Michigan, and Minnesota in order to address EPA's 2015 SSM SIP Action. EPA is proposing to determine that the three states' rulemaking actions and revised rules are consistent with the SSM requirements for SIP provisions under the CAA; that their

respective SIP submissions correct the SSM deficiencies identified for the state within EPA's 2015 SSM SIP Action; and fulfill the obligation to respond to it.

EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether each state's SIP revision addresses the finding of substantial inadequacy for the respective SIP provisions identified in the 2015 SSM SIP Action.

#### **IV. Incorporation by Reference.**

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Indiana rules 326 IAC 1-6-1, 326 IAC 1-6-2, 326 IAC 1-6-4, 326 IAC 1-6-5, 326 IAC 1-6-6; and 326 IAC 2-9-1, effective January 29, 2017, as discussed in Section II of this preamble. EPA has made, and will continue to make, these documents generally available through [www.regulations.gov](http://www.regulations.gov), and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Also in this document, as described in section II of this preamble, EPA is proposing to remove provisions of the EPA-Approved Michigan and Minnesota Regulations and Statutes from the Michigan and Minnesota SIPs, which are incorporated by reference in accordance with the requirements of 1 CFR part 51.

#### **V. Statutory and Executive Order Reviews.**

Under the CAA, the Administrator is required to approve a

SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 21, 2022.

Debra Shore,  
*Regional Administrator, Region 5.*

